Supreme Court, U.S.
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No. 03-559

In The

Supreme Court of the United States

October Term, 2003

SERGIO RENDON, et al.,

Petitioners,

v.

STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, et al.,

Respondents.

On Petition For A Writ of Certiorari To The Third District Court of Appeal, State of Florida

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The respondents submit that the first question should be stated as the issue is not whether Congress has authority to abrogate the States' sovereign immunity under Title II of the American with Disabilities Act, but whether it properly did so pursuant to its authority under section 5 of the Fourteenth Amendment. As argued, infra, the second question is moot.

1. Whether Congress properly abrogated the sovereign immunity of the States for claims under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 et seq.

2. Whether the Tenth Amendment to the United States Constitution prohibits the prospective enforcement of Title II of the Americans with Disabilities Act by entry of declaratory and injunctive relief against the responsible state officers in accord with Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908).

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STATEMENT OF THE CASE

Petitioners/Plaintiffs ("petitioners") filed this class action suit against the State of Florida, Department of Highway Safety and Motor Vehicles, and its executive director in his official capacity, and the State of Florida, Department of Transportation, and its secretary in his official capacity. Petitioners sought declaratory and injunctive relief and a refund of money paid pursuant to § 320.0848(2)(c), Fla. Stat. Prior to its amendment in 2002, § 320.0848(2)(c) provided for a small tax on parking placards issued to persons with certain qualifying disabilities. The parking placard allows the holder to park a vehicle in spaces reserved for persons with disabilities.

Petitioners have contended that the tax violated Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., and 28 C.F.R. § 35.130(f), a Department of Justice regulation implementing Title II. Nothing in Title II of the ADA has ever required the States to implement parking placard programs for the disabled. Nor does 28 C.F.R. § 35.130(f) impose such a requirement. The regulation provides:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(Emphasis added). Notwithstanding the fact that placard programs are not required by the ADA or the Equal Protection Clause of the Fourteenth Amendment, petitioners contend that a State violates the ADA by imposing even a nominal charge to administer such a program.

The impetus for placard programs arose among the States well before enactment of the ADA. As early as 1979, and on its own initiative, Florida began to require accessible parking for persons with impaired mobility. At that time Florida charged a fee of $.50 for small metal tags that could be affixed to license plates. See chap. 79-82, § 7, Laws of Florida (1979). In the 1980s the federal government sought to encourage a uniform, voluntary system that would enable the States to honor each others' tags. Pursuant to Public Law 100-641, the U. S. Department of Transportation adopted regulations in 1991 to serve as guidelines for a uniform system. See 23 C.F.R. Part 1235, Uniform System for Handicapped Parking (56 Fed. Reg. 10328). These regulations, adopted after passage of the ADA, left it to the states to decide whether and how much to charge for windshield placards. See 56 Fed. Reg. at 10344.

Although Department of Justice regulations adopted in 1991 state that public entities should create designated accessible parking spaces (which Florida had long been doing), even these regulations say nothing about a placard program. See 28 C.F.R. § 36.304(b)(18).

The trial court ruled that the imposition of the tax on the parking placards violated 28 C.F.R. § 35.130(f) and Title II of the ADA. Pet. App. 27, 29. The court enjoined collection of the tax and ordered the State to reimburse the plaintiff class for placard fees collected since January 26, 1992, including prejudgment and post-judgment interest. Pet. App. 29.

In 2002, after this case was appealed, the placard tax was eliminated. See chapter 2002-20, § 121, Laws of Florida. The statute, as amended, imposes an administrative fee of $1.50 payable to the county tax collector. See § 320.0848(2)(c), Fla. Stat. (2002). Prior to the amendment, the county tax collector was entitled to retain $1.50 from the amount assessed. No county tax collector was ever a party to this action, and the $1.50 administrative fee is not at issue.

The Third District Court of Appeal reversed the trial court, holding that Congress did not properly abrogate the States' sovereign immunity pursuant to its power under section 5 of the Fourteenth Amendment. The Third District also held that the Department of Justice exceeded its authority in enacting 28 C.F.R. § 35.130(f), because that regulation, and the requirements it imposed on the states, were beyond the scope of the Fourteenth Amendment. Accordingly, petitioners were not entitled to prospective injunctive relief. Pet. App. 9.

The Third District Court of Appeal denied the petitioners' motion for clarification and reconsideration, and the Florida Supreme Court denied review of the decision of the Third District. Pet. App. 31, 32.

REASONS FOR DENYING THE PETITION

Following the decision in University of Alabama v. Garrett, 531 U.S. 356 (2001), this Court has denied review in three cases in which courts of appeals rejected challenges to fees imposed in state-administered placard programs. Two of those cases found the Department of Justice regulation at issue here invalid under the Fourteenth Amendment. Although because of the pendency of Tennessee v. Lane, 325 F.3d 680 (6th Cir.), cert. granted, 123 S.Ct. 2622 (2003), the Court could hold the instant petition until that case is decided, denial of review would clearly be consistent with its previous action. Tennessee v. Lane does not concern the Department of Justice regulation here in question. Moreover, the circuit conflict on which petitioners rely is less than compelling.

In any case, only the first of the questions presented could possibly merit review. The second is moot by virtue of the repeal of the placard tax.

I. THE PERCEIVED CONFLICT AMONG THE CIRCUITS DOES NOT WARRANT REVIEW OF THE DECISION BELOW.

The decision below, ruling that Title II does not properly abrogate the sovereign immunity of the States pursuant to section 5 of the Fourteenth Amendment, is consistent with the holdings of at least seven circuits. The petitioners herein have never asserted that the placard tax violates a right to due process or that Title II of the ADA properly abrogated the sovereign immunity of the States under the Due Process Clause of the Fourteenth Amendment. Nor have they raised any claim of discriminatory animus. Thus, the conflict which they assert merits this Court's review is between the Ninth Circuit on one hand, and the Second, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits on the other. The Ninth Circuit has simply refused to apply this Court's Title I decision in University of Alabama v. Garrett, 531 U.S. 356 (2001), to Title II cases, relying on a pre-Garrett Title II decision.[1] The other seven circuits have all concluded that Title II of the ADA does not properly abrogate the States' sovereign immunity for the equal protection claim asserted here.[2]

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[1]See Hason v. Medical Bd. of California, 279 F.3d 1167 (9th Cir. 2002), relying on Dare v. California, 191 F. 3d 1167 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001).

[2]See Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002); Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001); Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000), cert. denied, 531 U.S. 1190 (2001); Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1979) (en banc), cert. dismissed, 529 U.S. 1001 (2000); Thompson v. Colorado, 258 F.2d 1241, amended 278 F.3d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002). The Second Circuit would allow a damages claim under Title II only on proof of discriminatory animus. See Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98 (2d Cir. 2001), while the Sixth Circuit has held that Title II of the ADA cannot be sustained as an act that enforces the Equal Protection

Moreover, following Garrett, this Court has thrice denied review of decisions rejecting challenges under Title II to state-imposed placard fees. See Thompson v. Colorado, 278 F.3d 1020, 1027-34 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); and Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999), cert. denied, 531 U. S. 1190 (2001); Neinast v. Texas, 217 F.3d 275 (5th Cir. 2000), cert. denied, 531 U.S. 1190 (2001).

The "conflict," therefore, is between seven circuits that have applied Garrett to Title II and one that has refused to do so. The respondents submit that this conflict is not one that merits review of the Third District's decision and that, consistent with its action in Thompson, Brown and Neinast, the Court should deny the writ.

II. THE SECOND QUESTION PRESENTED IS MOOT.

The fact that the Third District decided that no prospective injunctive relief was available does not present a question meriting the Court's review. The tax on parking placards was repealed before the Third District rendered its decision. There would be no point in enjoining the respondents from collecting a tax that no longer exists. Because petitioners' claimed right not to be taxed is no longer at issue, the question of prospective injunctive relief is moot. See Diffenderfer v. Central Baptist Church, 404 U. S. 412, 414-15 (1972); United States Department of Justice v. Provenzano, 469 U.S. 14 (1984). See also Green v. Mansour, 474 U.S. 64, 71-73 (1985) (because there was no

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Clause, but may be read to enforce the Due Process Clause. See Popovich v. Cuyahaga County Court, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002).

continuing violation of federal law, an injunction against state officials was unavailable).

Further, petitioners' argument does not accurately represent the holding of the Third District. On the question of prospective injunctive relief, the court adopted the "holding and rationale" of the Fourth Circuit's decision in Brown and ruled that 28 C.F.R. § 35.130(f), was beyond the remedial scope of section 5 of the Fourteenth Amendment. Thus, the court held that "because the regulation is invalid, prospective relief does not lie." Pet. App. at 9. Petitioners' brief to the Third District did not attempt to argue that the regulation could be justified on the basis of any Article I power of Congress. Hence, the court's footnote comment concerning cases decided under the Tenth Amendment and the lack of a clearly expressed Congressional intent to strip states of their traditional authority to charge fees for services is merely dicta. See Pet. App. at 9, n.5.

Accordingly, petitioners' statement that the decision below "is contrary to every Circuit decision on this point" is incorrect and presents no additional ground for review.

CONCLUSION

For the reasons stated, it would be appropriate for the Court to deny a writ of certiorari. Alternatively, in the absence of any demonstrated need to decide both this appeal and Tennessee v. Lane, the Court could withhold action until disposition of that case.

RESPECTFULLY SUBMITTED,

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